Filed 11/17/09 P. v. Dennis CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RODNEY DENNIS, JR., Defendant and Appellant.	E047355 (Super.Ct.No. FSB09939) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Colin J. Bilash, Judge. Affirmed.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Rodney Dennis, Jr., guilty of six counts of robbery (Pen. Code, § 211);[1] two counts of false imprisonment (§ 236); and two counts of assault with a firearm (§ 245, subd. (a)(2)). The jury also found true that defendant personally used a firearm (§§ 12022.53, subd. (b), 12022.5, subd. (a)) in the commission of the crimes. Defendant was sentenced to a total term of 34 years 8 months in state prison.

Defendant's sole contention on appeal is that the trial court erred in denying his suppression motion. We reject this contention and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

Sergeant Ricky Smith of the Redlands Police Department testified that on January 14, 2007, he was dispatched to the area of Downey Savings in Redlands in regard to two suspicious cars backed into a parking lot with all the occupants observing the front of a Trader Joe's grocery store. One of the cars was a blue Toyota; the other was a white Camaro. When Sergeant Smith arrived at the scene, he pulled behind both the vehicles as described to dispatch by the witness and attempted to make contact with the occupants.

As he was approaching the blue Toyota on the driver's side, he saw the driver, identified as defendant, look into the rearview mirror and then at the juvenile passenger. Sergeant Smith believed they were about to drive away. He therefore yelled, "Stop."

---

[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] As the only issue raised on appeal involves the denial of the suppression motion, the factual background will be taken from the suppression hearing.

However, the front passenger's door in the Toyota closed, and defendant sped away. The Camaro also sped away. Sergeant Smith ran back to his patrol vehicle, turned on the car's light and siren, and began pursuing the Toyota.

During the pursuit, defendant sped through the parking lot and "rolled through" a stop sign. About a minute later, defendant stopped behind the Trader Joe's. At that time, Corporal Knapp arrived at the scene. Sergeant Smith and Corporal Knapp spoke with defendant and the passenger. Within one or two minutes, dispatch reported that a witness had seen a gun being thrown out of the driver's side window. Other officers were informed to investigate this information while Sergeant Smith detained defendant and the passenger on the curb. Once it was confirmed to Sergeant Smith that a gun had been recovered, he arrested defendant and the passenger. Defendant was arrested for an active warrant, contributing to the delinquency of a minor, possession of a handgun inside a vehicle, and disobeying a police order to stop.

Following defendant's arrest, the vehicle driven by defendant was searched incident to the arrest and as an inventory search as the vehicle was being impounded. During the search of the vehicle, a rubber skeleton mask, baseball-type gloves, lottery tickets, and latex gloves were found.[3]

---

[3] Some of these items were used in the commission of the crimes. In addition, utilizing information from the search of defendant's car, detectives obtained a search warrant to search defendant's home. A search of defendant's home revealed additional information linking defendant to robbery of a 7-Eleven store and a T-Mobile store at gunpoint.

Witness Robert Bustamante observed Sergeant Smith pursuing defendant in the Trader Joe's parking lot. During the pursuit, Bustamante and his family saw a metal object, later identified as a gun, being thrown out the front driver's side window of the vehicle driven by defendant. Bustamante reported this observation to the police and was advised to remain at the scene until police arrived. After officers arrived at the scene, Bustamante pointed to the area where the gun was deposited. He was then taken to conduct an in-field lineup around the corner. Bustamante identified the vehicle as well as defendant as the driver of the vehicle.

Officer Patrick Leivas of the Redlands Police Department testified that he was dispatched to the parking lot of Downey Savings in regard to suspicious occupied vehicles. When he arrived at the scene, he was directed by Sergeant Smith to contact Bustamante about an object being thrown out of a vehicle. Upon contacting Bustamante, Bustamante explained to the officer what he had observed and showed Officer Leivas where the gun was located. Officer Leivas then took the gun into evidence and notified Sergeant Smith of the finding. Bustamante was subsequently taken by Officer Leivas to conduct an in-field lineup.

Following defendant's arrest and the filing of an information charging defendant and his cohorts with numerous offenses, defendant filed two motions to suppress the evidence found in the vehicle. After presentation of testimony, as outlined above, and argument from counsel, the trial court denied the suppression motion. The trial court noted, "Certainly, there was probable cause to stop the vehicle. Besides the numerous

traffic infractions, plus the evading and subsequent arrests being legal, [the] search . . . is permissible . . . pursuant to that arrest."

II

DISCUSSION

Defendant contends the trial court erred in denying his suppression motion because he was not within reaching distance of the passenger compartment of the car, and it was not reasonable to believe the vehicle contained "evidence of the offense of arrest." We disagree.

In reviewing the trial court's denial of a motion to suppress evidence, we defer to the trial court's express or implied factual findings where supported by the evidence and exercise our independent judgment in determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment. (*People v. Weaver* (2001) 26 Cal.4th 876, 924.) "The trial court also has the duty to decide whether, on the facts found, the search was unreasonable within the meaning of the Constitution. . . . [I]t becomes the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness." (*People v. Lawler* (1973) 9 Cal.3d 156, 160.)

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." However, "[t]he Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are

unreasonable." (*Florida v. Jimeno* (1991) 500 U.S. 248, 250 [111 S.Ct. 1801, 114 L.Ed.2d 297].)

Warrantless searches, although usually per se unreasonable, are considered reasonable in various contexts. (*Katz v. United States* (1967) 389 U.S. 347, 357 [88 S.Ct. 507, 19 L.Ed.2d 576].) The warrantless search of an automobile, for instance, can be justified on a variety of grounds, among them: (1) probable cause to believe the car contains contraband (*Carroll v. United States* (1925) 267 U.S. 132, 149 [45 S.Ct. 280, 69 L.Ed. 543]); (2) the search is incident to the arrest of an occupant of the vehicle (*New York v. Belton* (1981) 453 U.S. 454, 460 [101 S.Ct. 2860, 69 L.Ed.2d 768]); or (3) the search is part of the inventory of a lawfully impounded vehicle (*South Dakota v. Opperman* (1976) 428 U.S. 364 [375-376, 96 S.Ct. 3092, 49 L.Ed.2d 1000]).

If the arrest was lawful, the subsequent search of defendant's car was also lawful because, once Officer Leivas alerted Sergeant Smith to the discovery of the gun and information linking defendant to the gun, the police had probable cause to search the entire car, including the trunk. (*United States v. Ross* (1982) 456 U.S. 798, 809 [102 S.Ct. 2157, 72 L.Ed.2d 572] [under "automobile exception" to the Fourth Amendment's warrant requirement, a "search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained"]; *Arizona v. Gant* (2009) ___ U.S. ___ [129 S.Ct. 1710, 1721, 173 L.Ed.2d 485] (*Gant*) ["[i]f there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821, 1025 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a

search of any area of the vehicle in which the evidence might be found"]; *People v. Chavers* (1983) 33 Cal.3d 462, 466 [under *Ross*, "police officers who lawfully stop a vehicle, having probable cause to believe that contraband is located or concealed somewhere therein, may conduct a warrantless search of the vehicle that is as thorough (as to location and type of container searched) as that which a magistrate could authorize by warrant"]; *People v. Panah* (2005) 35 Cal.4th 395, 469 [same].)

Vehicle Code section 2800.1 provides the offense of evading a peace officer is committed by "[a]ny person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle . . . ." A violation of Vehicle Code section 2800.1 is a misdemeanor. (Veh. Code, § 40000.7, subd. (a)(3).) A police officer may make a misdemeanor custodial arrest when the officer has "probable cause to believe that the person to be arrested has committed a public offense in the officer's presence." (Pen. Code, § 836, subd. (a)(1); see *Atwater v. City of Lago Vista* (2001) 532 U.S. 318 [121 S.Ct. 1536, 149 L.Ed.2d 549] [Fourth Amendment does not forbid custodial arrest for a fine-only misdemeanor]; *People v. McKay* (2002) 27 Cal.4th 601 [same].) "Probable cause . . . exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime." (*People v. Kraft* (2000) 23 Cal.4th 978, 1037.)

Defendant does not dispute that there was sufficient probable cause to arrest him for evading a peace officer. (Indeed, he makes no mention of this conclusion by the trial

court.) Instead, relying on the United State Supreme Court's recent decision in *Gant, supra,* 129 S.Ct. 1710, defendant argues that, because he was detained and arrested on the curb, the area of the vehicle (or the interior of the vehicle) that was searched was not within defendant's immediate control, and therefore the warrantless search of his vehicle was improper.

In *Gant* the police made a pretextual stop for driving with a suspended license. After Gant was arrested, handcuffed, and placed in a patrol car, the police conducted a warrantless search of his car. They found drugs in the passenger compartment. The state sought to uphold the validity of the search on the ground that it was a search incident to an arrest. In concluding the search was unlawful, the court held that the "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Gant, supra,* 129 S.Ct. at p. 1723.)

The United States Supreme Court disapproved a broad reading of *Belton* and clarified the application of *Thornton v. United States* (2004) 541 U.S. 615 [1245 S.Ct. 2127, 158 L.Ed.2d 905]. The majority in *Gant* explained, "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle;" however, consistent with *Thornton*, "circumstances unique to the automobile context justify a search incident to arrest when

it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." (*Gant, supra,* 129 S.Ct. at p. 1714.)

As explained previously, searches conducted without a warrant are per se unreasonable under the Fourth Amendment except for a few well-delineated exceptions. (*Gant, supra,* 129 S.Ct. at p. 1716.) One of these exceptions is a search incident to a lawful arrest, which must be based on concerns for officer safety and evidence preservation. (*Ibid.*; *Chimel v. California* (1969) 395 U.S. 752, 762-763 [89 S.Ct. 2034, 23 L.Ed.2d 685].)

Belton considered the application of *Chimel* in the context of an automobile search. (*Belton, supra,* 453 U.S. at p. 460.) *Belton* held that "when an officer lawfully arrests 'the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile' and any containers therein." (*Belton, supra,* 453 U.S. at p. 460.) *Gant* rejected the prevalent broad reading of *Belton* as authorizing a vehicle search incident to every recent occupant's arrest because it would divorce the rule from the justifications underlying the *Chimel* exception. (*Gant, supra,* 129 S.Ct. at p. 1719.) *Gant* therefore held that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." (*Ibid.*, fn. omitted.)

Gant recognized, however, that, consistent with *Thornton*, police must be able to search a vehicle incident to a lawful arrest when it is "'reasonable to believe evidence

relevant to the crime of arrest might be found in the vehicle.'" (*Gant, supra*, 129 S.Ct. at p. 1719.) *Gant* noted although this exception is not grounded in the rationale of *Chimel*, the unique circumstances of the vehicle context justify a search incident to arrest in this situation. (*Gant*, at p. 1719.) In many cases, such as when a vehicle's occupant is arrested for a traffic violation (as occurred with Rodney Gant), there will be no reasonable basis to search the vehicle for evidence. (*Ibid*.) In other cases, such as *Belton* and *Thornton*, the offense for which the occupant is arrested supplies a justification for searching the passenger compartment of the arrestee's vehicle and any containers police find within it. (*Ibid*.)

Defendant's is just such a case. After defendant was ordered to stop when Sergeant Smith first approached the two vehicles in the Trader Joe's parking lot, defendant sped away, and a pursuit ensued. After defendant stopped and was detained on the curb, Sergeant Smith received information that a gun had been thrown out of the vehicle being driven by defendant from the driver's side window. Defendant and his passenger were then arrested, and the car was searched incident to the lawful arrest.[4] The officers in this case clearly had a reasonable belief that "evidence of the offense of arrest might be found in the vehicle." (*Gant, supra*, 129 S.Ct. at p. 1714.) The vehicle may have contained additional firearms, ammunition, or other contraband.

---

[4] From the record in this matter, it is not clear whether or not defendant had been placed in the patrol car at the time of the search or what the distance was between the curb where defendant was detained and the car.

The recent decision in *People v. Osborne* (2009) 175 Cal.App.4th 1052 (*Osborne*) is instructive. In that case, after the officers reasonably detained the defendant near his vehicle, they lawfully performed a patdown search and located a loaded firearm in his pocket. (*Id*. at p. 1062.) The defendant was arrested for being a felon in possession of a firearm. Incident to that arrest, the officers searched the defendant's vehicle and found drugs. (*Ibid*.) Following an analysis of the *Gant* decision, the *Osborne* court concluded that the officers had reason to believe the car might contain evidence relating to the illegal possession of a firearm arrest. (*Id*. at pp. 1063-1065.) The court stated: "Here, when Officer Malone found the firearm on defendant's person, he had probable cause to arrest him for illegal possession of a firearm and could then conduct a search incident to his arrest. Given the crime for which the officer had probable cause to arrest (illegal possession of a firearm), it is '"reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."' [Citation.] Unlike simple traffic violations, which the court in *Gant* specifically noted may provide no reasonable basis for believing the vehicle contains relevant evidence, illegal possession of a firearm is more akin to possession of illegal drugs, which would provide such a reasonable belief. [Citation.] Although the firearm found on defendant was loaded, it was reasonable to believe that the vehicle might contain additional items related to the crime of gun possession such as more ammunition or a holster." (*Id.* at p. 1065, fns. omitted.)

As noted by our colleagues in *Osborne, supra,* 175 Cal.App.4th at page 1065, "[t]he *Gant* court specifically requires only a 'reasonable basis to believe' the vehicle

contains relevant evidence, a standard less than full probable cause. [Citation.]" Accordingly, we conclude that the search of defendant's car was lawful. The trial court therefore properly denied the motion to suppress evidence, and defendant's arguments are without merit.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

GAUT
J.

MILLER
J.